RECORD
AND
BRIEFS

No. 12-10

In The
Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF INDEPENDENT SECTOR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Independent Sector is a leadership forum for charities, foundations, corporate giving programs, and nonprofit and non-governmental organizations ("NGOs") committed to advancing the common good in America and around the world. Specifically, Independent Sector is a nonpartisan coalition of approximately 600 organizations primarily based in the United States, whose mission is to lead, strengthen, and mobilize the nonprofit community in order to fulfill its vision of a just and inclusive society and of a healthy democracy of active citizens, effective institutions, and vibrant communities. Independent Sector's members include nonprofit organizations that receive Government and private philanthropic funding, as well as foundations and corporate philanthropies that donate to nonprofits receiving Government funding.

Independent Sector's members comprise an essential element of the "third sector," that part of society that is distinct from Government and business.[2] On behalf of its members, Independent Sector

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the above-mentioned *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See generally* Joel Fleishman, THE FOUNDATION: A GREAT AMERICAN SECRET: HOW PRIVATE WEALTH IS CHANGING THE WORLD

(Continued on following page)

seeks to advise the Court on the fundamental importance of safeguarding the independence and autonomy of this sector. Such associational autonomy is critical to productive cooperation between the Government, the private sector, and the nonprofit sector, and is an animating principle of our constitutional jurisprudence and democratic tradition.

Several of Independent Sector's members and/or members' constituent organizations are United States-based recipients of Leadership Act funds and are thus directly affected by the pledge requirement at issue in this case, 22 U.S.C. § 7631(f). They therefore are required by the Act to adopt a policy expressly opposing prostitution and to cease all activities deemed to be inconsistent with opposition to prostitution, even where those activities are funded wholly by private sources. Each organization receiving such funds has thus been compelled to espouse a particular, Government-sponsored position and to forgo any alternative expression. This unconstitutional condition, placed on the receipt of federal funds, directly interferes with the rights to speak and to associate for the purposes of speaking collectively on matters of public concern. Moreover, the implementing regulations, which set forth stringent requirements for maintaining "organizational integrity" by which recipients must distance themselves from affiliate organizations whose activities and speech might

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52 (2007) (describing charities and foundations as "a powerful third force" in society).

conceivably run afoul of the pledge requirement, are burdensome and inadequate to cure the unconstitutional conditions imposed by the pledge requirement. Finally, by engaging in viewpoint discrimination and compelling members of the third sector to adopt a particular position on a controversial issue – when, in fact, many organizations wish to remain neutral on this issue – the pledge requirement distorts the marketplace of ideas and diminishes the integrity of the third sector.

Independent Sector respectfully urges affirmance of the judgment of the United States Court of Appeals for the Second Circuit, and respectfully submits this brief to explain the importance of preserving the associational independence upon which Independent Sector's member organizations, the third sector as an entirety, and, ultimately, our constitutional democracy, depend.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that the Respondents demonstrated a likelihood of success on the merits of their claim that the pledge requirement of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), violates the First Amendment rights of organizations that receive Leadership Act

funds.[3] Specifically, by mandating that funding recipients adopt "a policy explicitly opposing prostitution," 22 U.S.C. § 7631(f), and otherwise prohibiting them from engaging in activities "inconsistent" with that policy, *e.g.*, 45 C.F.R. § 89.3, the Leadership Act's pledge requirement compels funding recipients to affirmatively express a particular viewpoint favored by the Government and, thus, exceeds the bounds of permissible Government action. *See Alliance for Open Soc'y Int'l, Inc. v. USAID ("AOSI")*, 651 F.3d 218, 230-39 (2d Cir. 2011). Furthermore, by placing these unconstitutional conditions on the receipt of Leadership Act funds, the pledge requirement not only contravenes principles upon which our democracy rests, but also undermines the strength and vitality of the longstanding and productive partnership between Government and civil society. As set forth in further detail below, it does so in three ways.

First, the pledge requirement violates the First Amendment rights of Leadership Act grantees by conditioning access to government funds on the adoption of a particular government viewpoint and waiver of the First Amendment right to use private funds to engage in constitutionally protected speech.

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[3] Because this case comes before the Court following the Court of Appeals' affirmance of a grant of a preliminary injunction, *see Alliance for Open Soc'y Int'l, Inc. v. USAID*, 570 F. Supp. 2d 533, 545-46 (S.D.N.Y. 2008), *aff'd*, 651 F.3d 218, 230 (2d Cir. 2011), the constitutional claim in this case is subject to the likelihood-of-success standard, *see Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (per curiam).

Thus, the pledge requirement restricts the ability of organizations to speak freely and independently on matters of concern to them and to undertake expressive activity to that end.

Second, the pledge requirement contravenes the independence and autonomy of nonprofit organizations and private voluntary associations to speak freely on matters of public concern, the value of which has been recognized time and again by this Court and has been a critical feature of this nation's history. By interfering with the third sector's independence and autonomy, the pledge requirement compromises the salutary benefits – including safeguarding minority rights, fostering diversity and pluralism, and encouraging innovation – that nonprofit organizations and other voluntary associations provide.

Third, the pledge requirement violates the integrity and undermines the autonomy of the third sector in general and of Independent Sector's members in particular. Independence is a critical feature of these organizations' ability to effectively partner with Government and provide innovative approaches to addressing urgent social problems at home and abroad. The pledge requirement, by requiring adherence to a specific viewpoint by entire entities, stifles divergent viewpoints, and interferes with nonprofit and philanthropic activity.

ARGUMENT

I. THE PLEDGE REQUIREMENT IMPOSES UNCONSTITUTIONAL CONDITIONS ON THE FIRST AMENDMENT FREEDOMS OF NONPROFIT AND PHILANTHROPIC ORGANIZATIONS.

The pledge requirement places conditions on the receipt of federal funds in violation of the First Amendment. Specifically, the Leadership Act engenders an unconstitutional condition by, first, requiring that the entity receiving federal funds adopt a particular viewpoint – that is, the viewpoint espoused by the Government – as a condition of receiving such funds; and, second, by mandating that recipient organizations forgo certain speech, even when that speech is funded by non-governmental sources. As the Court of Appeals correctly concluded, the pledge requirement amounts to viewpoint discrimination that must be subjected to heightened scrutiny, which it ultimately fails. *See AOSI*, 651 F.3d at 230-39.

Under the unconstitutional conditions doctrine, the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Thus, this Court has held that Government may not condition eligibility for a property tax exemption on a taxpayer's oath of loyalty to the United States, *see Speiser v. Randall*, 357 U.S. 513 (1958); may not condition funding for noncommercial broadcasting on stations' editorial content, *see FCC v.*

League of Women Voters of Cal., 468 U.S. 364 (1984); and may not condition funding for legal services on an attorney forgoing certain constitutional and statutory claims on behalf of his client, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). Further, this Court has consistently rebuffed attempts by Government to compel private individuals or organizations to pledge support for a particular policy or viewpoint as a condition of participating in a Government program. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (refusing to permit cancellation of a trash hauling contract because contractor had vigorously criticized local government); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (invalidating removal of a tow truck operator from municipality's rotation list as a penalty for refusing to support mayor's re-election); *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking law conditioning state residents' use of road on display of State motto on license plates); *Elrod v. Burns*, 427 U.S. 437 (1976) (holding that public employee's continued employment could not be conditioned on his political party affiliation); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (declaring unconstitutional requirement that children recite pledge of allegiance as condition of attending public school); *cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61-62 (2006) (upholding law requiring schools receiving federal funding to permit military recruiting on campus because that condition did not "approach[ ] a Government-mandated pledge or motto that the school must endorse"). This Court

has also refused to allow the Government to condition access to funding on a waiver of the First Amendment right to use private funds to engage in constitutionally protected speech. *See League of Women Voters*, 468 U.S. at 400-01 (striking federal funding condition that did not permit recipient "to segregate its activities according to the source of its funding").

The Leadership Act, however, specifically forces nonprofit and philanthropic organizations to pledge support for a particular Government policy as a condition of qualifying for the receipt of federal funds. Thus, this provision expressly conditions access to Government funding on the forfeiture of free expression and the adoption of a particular viewpoint. But "[c]ompelling speech as a condition of receiving a Government benefit cannot be squared with the First Amendment," *AOSI*, 651 F.3d at 234, especially where the compelled speech "requires recipients to take the government's side on a particular issue," *id.* at 235. This is especially so where, as here, the Government places the expressive restriction on recipient nonprofit and philanthropic organizations as a whole, thus prohibiting contrary expressive activity even outside of the confines of the federally funded program. *See League of Women Voters*, 468 U.S. at 400-01. The pledge requirement therefore deprives the public of truly independent voices, skews the marketplace of ideas towards the Government's favored position, and is anathema to our constitutional tradition and this Court's settled jurisprudence. Accordingly, it must be invalidated.

II. THE PLEDGE REQUIREMENT UNDERMINES THE THIRD SECTOR'S INDEPENDENCE AND AUTONOMY, A VALUE ENSHRINED IN THIS COURT'S CONSTITUTIONAL JURISPRUDENCE AND IN THIS NATION'S HISTORY

The vitality, diversity, and abundance of voluntary associations and non-governmental institutions constitute a central pillar upon which American democracy rests. Further, the speech engaged in by private voluntary associations, such as nonprofit and philanthropic organizations, fulfills a critically important function in a democratic society. Such speech lessens the authority of the majority, serves as a bulwark against the power of the state, and enables individuals to more powerfully and effectively advance diverse and competing views in the marketplace of ideas. As this Nation's history shows and as is enshrined in our constitutional jurisprudence, in order to carry out these critical functions, such private associations must maintain their independence from the state. By suppressing these associations' speech and affirmatively requiring them to espouse a particular view – even when they wish to remain neutral or in fact hold an opposite or nuanced view – as a condition of receiving federal funding, the pledge requirement undermines the associational independence and autonomy at the heart of the American democratic system. While nonprofit and philanthropic organizations often partner with the Government, this valuable partnership need not – and indeed,

must not – compromise the associational and expressive autonomy and independence of the third sector.

That associational activity and the collective expression of shared beliefs and viewpoints lie at the core of the First Amendment's protections cannot be gainsaid. Voluntary association is an essential aspect of the freedom of speech memorialized in the Constitution, U.S. CONST. amend. I, and this Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *accord Christian Legal Soc. Chapter of Univ. of Calif., Hastings College of Law v. Martinez*, 130 S. Ct. 2971, 2985 (2010). This right of association is a right to speak collectively on matters of public concern, and the Constitution jealously guards that freedom precisely because it guarantees "'the right of people to make their voices heard on public issues,'" especially where, "'individually, their voices would be faint or lost.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982) (quoting *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294-95 (1981)). *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of

speech and assembly."). Freedom of association is therefore protected as a fundamental component of our personal liberty. Indeed, "[t]he most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of Association therefore . . . is as inalienable in its nature as the right of personal liberty." Alexis de Tocqueville, DEMOCRACY IN AMERICA 117 (Phillips Bradley ed., 1990).[4] Of course, corporate

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[4] Although the lower courts focused on the effect of the Leadership Act on recipients' speech, the First Amendment protection afforded associational rights – namely, the freedom to advocate *collectively* in favor of a particular viewpoint – further supports the Court of Appeals' conclusion that the regulation here at issue should be subjected to heightened scrutiny. *See Patterson*, 357 U.S. at 460-61 ("State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (holding that encroachment on associational right must be justified by compelling reason). This Court has repeatedly struck down state action which curtails or distorts associational expression, including penalizing or withholding benefits from individuals because of their membership in a disfavored group, mandating disclosure of membership rolls, and interfering with groups' internal organization or affairs. *See Roberts*, 468 U.S. at 622-23. *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that right of expressive association trumps state public accommodations law); *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1974) (holding that associations have right to be free from state interference with the internal structure of the organization); *Gibson v. Fla. Legislative Investigation Comm.*, 371 U.S. 539 (1963) (contempt conviction for refusal to divulge information in local NAACP membership lists violated right of association); *Shelton v. Tucker*, 364 U.S. 479 (1960) (statute compelling

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bodies, including nonprofit and philanthropic organizations, benefit from the protections that this constitutional tradition affords. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 342-43 (2010).

As an historical matter, "'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.'" *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)). Indeed, American life has long been characterized by vigorous associational activity. "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world." DEMOCRACY IN AMERICA at 113. "In their political associations the Americans of all conditions, minds, and ages, daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings." *Id.* at 129. *See also* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 186-96, 319-28 (1969) (associations have been a distinctive feature of American life from the earliest days of the Republic); David Cole, *Hanging With The Wrong Crowd: Of Gangs, Terrorists, and The Right Of Association*, 1999 Sup.

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teachers to file affidavit organizational affiliation invalid on the grounds of associational freedom).

Ct. Rev. 203 ("Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammeled right to form voluntary associations." (quoting Arthur Schlesinger, PATHS TO THE PRESENT 23 (1949))). Indeed, associational activity was extolled by the Framers as a critical manner by which to maximize the power of the people and minimize the dangers of centralized government. *See* THE FEDERALIST NO. 56, at 53 (James Madison) (Clinton Rossiter ed., 1961) (describing the virtues of voluntary private association as minimizing the dangers attendant to centralized power).

This Court has long upheld this tradition by unwaveringly safeguarding the autonomy and independence of nonprofit and philanthropic organizations, in particular, in other strands of jurisprudence outside the First Amendment context. Thus, in the foundational case *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall observed that the mere incorporation of Dartmouth College, a private, charitable educational institution, did not render it an arm of the State of New Hampshire, but instead amounted to a private contract that transferred assets from the original donors to the corporation, *id.* at 644, and that New Hampshire could not impair, *id.* at 650. Courts likewise have been careful to maintain the distinction between private nonprofit and philanthropic organizations and public entities, *see, e.g.*, *Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 938 (7th Cir.

2004) (concluding that trust created by statute was independent of the State), and have only determined that such organizations are state actors in very limited circumstances, *see, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Ass'n*, 531 U.S. 288, 295 (2001) (describing "close nexus" that must exist between state and private association to bring association's action within Fourteenth Amendment); *Jackson v. Statler Found.*, 496 F.2d 623, 639 (2d Cir. 1974) (Friendly, J., dissenting from denial of rehearing *en banc*) ("[C]ourts should pay heed . . . to the value of preserving a private sector free from the constitutional requirements applicable to government institutions." (internal quotation marks omitted)). Further, because the third sector is autonomous, this Court has consistently held that Government funding to nonprofit, faith-based organizations does not, by itself, compel the conclusion that the Government has engaged in constitutionally impermissible espousal or establishment of religion. To the contrary, in order to raise Establishment Clause concerns, this Court has required additional facts indicating that the Government did not neutrally administer such aid, but specifically intended to subsidize religious activity by funding groups that operate independently of any public body. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Agostini v. Felton*, 521 U.S. 203, 229-32 (1997); *Walz v. Tax Comm'r*, 397 U.S. 664, 673-74 (1970).

Without question, our constitutional democracy has been and continues to be well served by protecting the third sector's independence and autonomy. To

begin, the right of nonprofit and philanthropic organizations to associate free of Government interference lessens the authority of the majority and strengthens the minority. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (characterizing right of expressive association as "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); *Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."); *Patterson*, 357 U.S. at 462. As De Tocqueville observed, "[i]n America, the citizens who form the minority associate in the first place to show their number and lessen the moral authority of the majority." DEMOCRACY IN AMERICA 117.

Second, maintaining nonprofit and philanthropic organizations' independence and autonomy encourages "political and cultural" diversity and gives voice to our "abiding commitment to pluralism." *Patterson*, 357 U.S. at 277-78. As Justices Brennan and Powell separately observed, a signal virtue of the third sector is its unique contribution "to the pluralism of American society" and "diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Walz*, 397 U.S. at 689 (Brennan, J., concurring); *accord Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring) ("Far from representing an effort to reinforce any perceived 'common community conscience,' the provision of tax

exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life."). Indeed, associational life provides the participants in the third sector with "socialization into the political values necessary for self-government" in a diverse, pluralistic society. CIVIL SOCIETY AND GOVERNMENT 18 (Robert C. Post and Nancy L. Rosenbaum eds., 2002).

Third and finally, the right of expressive association protects against tyranny and serves as a bulwark against centralized power. "Despotism, by its very nature suspicious, sees the isolation of men as the best guarantee of its own permanence." DEMOCRACY IN AMERICA 119; Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1313 (2d ed. 1988) ("[T]o destroy the authority of intermediate communities and groups . . . destroys the only buffer between the individual and the state."); *cf. DeJonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (reasoning that First Amendment associational rights ensure that "government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means"). The third sector thus serves as a "center of collective political resistance against capricious and oppressive government." CIVIL SOCIETY AND GOVERNMENT at 18.

Today, the third sector is flourishing under these independent and autonomous conditions: nearly half of all adults volunteer each year, and nine out of ten households make charitable contributions, towards diverse causes. Independent Sector, PANEL ON THE

NONPROFIT SECTOR: STRENGTHENING TRANSPARENCY, GOVERNANCE, AND ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 9 (June 2005). The resulting free interplay of numerous viewpoints has led to the incubation of new ideas by private associations that now seem commonplace, including, as just one powerful example, the 9-1-1 emergency response system. *Id.* at 10. Charitable organizations have also been the partners through which the Government effectively and efficiently delivers services such as early childhood education programs, health clinics, drug counseling, and after-school programs. *Id.* at 11; *see also* Arnaud C. Marts, PHILANTHROPY'S ROLE IN CIVILIZATION: ITS CONTRIBUTION TO HUMAN FREEDOM 50 (1991) (noting that this sector has pioneered almost every cultural advance for the past three hundred years); Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 Cornell J.L. Pub. Pol'y 325, 332 (1997); Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in THE NONPROFIT SECTOR 99 (Walter W. Powell ed., 1987). Indeed, as the district court aptly observed below:

> [T[he far-reaching role of NGOs in presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues, in influencing the course of public policy as well as in enhancing core public values and safeguarding them from government abuse, has always been critical to our democracy. From the beginning

> of the Republic to this day, as Congress itself recognized in the Act, NGOs have played a significant role as partners of government in administering vital public services. They promote fuller participation and a diversity of views in civil society. They have served as advocates of public causes as voices for the marginalized, disenfranchised and impoverished, and as counterweight to the more powerful interests in our society, both as friends and as adversaries of the government. They engage in conducting public forums to disseminate information, opinions and advice on issues before the government, a function that is critical to an informed citizenry. Quite simply, public interest groups have resources and capabilities that individuals, acting alone, do not. . . .

Alliance for Open Soc'y Int'l, Inc. v. USAID, 430 F. Supp. 2d 222, 262-63 (S.D.N.Y. 2006).

It follows that the Government must not be permitted to supervise or manage nonprofit and philanthropic associations or to interfere with their free speech "lest their independent influence on society be diluted" and the marketplace of ideas be stifled. DEMOCRACY IN AMERICA 115-119, 312. Indeed, attempts to bring the third sector under the control of the Government will inevitably discourage participation of the public in private associations. As this Court warned nearly two centuries ago, governmental obstruction of nonprofit and philanthropic autonomy threatens to undermine charitable giving and deprive

American society of the great value that the third sector provides. *See Dartmouth College*, 17 U.S. (4 Wheat.) at 647 (Marshall, C.J.) ("It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that . . . [its] funds are to be governed and applied, not by the will of the donor, but by the will of the legislature."); *id.* at 671 (Story, J., concurring) (1819) (predicting that conflation of private charities with governmental entities "would extinguish all future eleemosynary endowments"). As should be obvious, "[t]he interest in preserving an area of untrammeled choice for private philanthropy is very great," *Jackson*, 496 F.2d at 639-40 (2d Cir. 1974) (Friendly, J., dissenting from denial of rehearing *en banc*), because the third sector's independence and autonomy preserves the constitutional and historical values of free expression and pluralism, and prevents the "loss of innovative solutions to social problems" that would inhere if nonprofit and philanthropic organizations were unable to pursue their chosen missions, Evelyn Brody and John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 Chi. Kent L. Rev. 571, 615 (2010).

This is not to say, and *amicus* does not contend, that there can be no laws governing this sector; rather *amicus* only contends that the Government must not interfere with private associations in a manner that compromises their independence, and with it, their salutary function in society. That is because it is its independence from Government

interference that enables the third sector to serve this critical function. As the district court stated below, "The diversity and breadth of the traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities." *AOSI*, 430 F. Supp. 2d at 262-63. While Government should, and commonly does, partner with private associations, and while it is certainly appropriate for Government to shape and tailor *its* funding to serve the purposes it wishes, it is not permissible for the Government to use funding to compel the entities with which it partners, many of which receive much of their funding from other sources, to espouse particular positions, whether they adhere to them or not. *See League of Women Voters*, 468 U.S. at 400 (invalidating federal condition prohibiting broadcaster from all editorializing, even if 99% of that broadcaster's income derived from private or non-federal sources). Accordingly, the Court of Appeals properly invalidated the pledge requirement, which exceeds the bounds of permissible Governmental funding conditions and is inconsistent with the constitutional and historical traditions of nonprofit and philanthropic organizations' independence and autonomy from Government. *See AOSI*, 651 F.3d at 230-39.

III. THE PLEDGE REQUIREMENT UNDERMINES THE VALUABLE PARTNERSHIP BETWEEN GOVERNMENT AND THE THIRD SECTOR.

Requiring those members of Independent Sector members that receive Leadership Act funds to satisfy the pledge requirement and to cease all contrary speech is in impossible tension with this Court's jurisprudence and our nation's history, and, as the Court of Appeals held, compromises Leadership Act grantees' free speech, as well as the rights of their members to associate for the purposes of collective expression. Equally troubling, the pledge requirement undermines the independence of the third sector and, thus, the crucial partnership between Government and civil society. And it further deprives the public of independent voices, while creating the misleading impression that a chorus of independent voices endorses a single viewpoint – that of the Government.

Private associations have long provided critically needed services in concert with Governmental programs and entities and have assisted the Government in solving pressing social problems. But the success of this partnership has hinged on the independence of the third sector from Governmental control. Without such independence and autonomy, the creativity and innovation that define this sector would be muted and the number of valuable contributions to American life would decrease dramatically. After all, the organized efforts of the third sector to abolish slavery,

protect civil rights, and create public libraries all depended upon the independence of private, voluntary associations that arose in order to bring about these results. *See* John H. Filer, *The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs*, in THE NONPROFIT ORGANIZATION: THE ESSENTIAL READINGS 70, 80 (David L. Geis et al. eds., 1990). It is precisely their independence from Government control – and their corresponding freedom to innovate and effect change – that enables the third sector to effectively partner with the Government. Indeed, elsewhere Congress has recognized the importance of relying on the third sector to achieve development objectives abroad "without compromising their private and independent nature." Foreign Assistance Act, 22 U.S.C. § 2151u. And Petitioner USAID has itself "recognize[d] the independent mission" of the third sector, and has acknowledged that one "inherent challenge" "is achieving the right mixture of collaboration and independence between public and private spheres. A healthy degree of separation between the two is essential for the unique mission of each, but cooperation is also critical to the success of both." USAID Report, *2006 Report of Voluntary Agencies Engaged in Overseas Relief and Development Registered with USAID* 4.

Here, the pledge requirement directly compromises the independence and autonomy of Independent Sector's member-organizations that receive Leadership Act funds; it thereby cripples their valuable

partnership with Respondents – a point that the Government's brief fails to appreciate. The Government reasons that, by accepting Leadership Act funds, members of the third sector simply become the Government's "faithful agents" who may not frustrate Congress's express aim of eliminating HIV/AIDS by eradicating sex work. Pet'rs Br. 32. But one of the fundamental flaws of the pledge requirement is that it compels the grantee as an entity, rather than merely as the administrator of a particular project, to adopt a governmental viewpoint that it would otherwise not express, and "to do so as if it were their own." *AOSI*, 651 F.3d at 237. In other words, a recipient organization is unable to maintain silence regarding its views as to sex work and is not permitted to indicate that any professed views regarding sex work are strictly those of its grantor. This exceeds the bounds of funding conditions on the third sector that this Court previously tolerated in *Rust v. Sullivan*, 500 U.S. 173 (1991), where the Governmental funding condition specifically did not compel a recipient "to represent as his own any opinion that he does not in fact hold," or otherwise require the recipient to adopt a particular viewpoint on a contested social matter. *Id.* at 200. Rather, by requiring the *grantee*, and not the *project*, to affirmatively adopt this policy, *see id.* at 196, the Government here has "stepped beyond what might have been appropriate to ensure that its anti-prostitution message would not be 'garbled' or 'distorted,'" *AOSI*, 651 F.3d at 237 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

The pledge requirement thus attacks the third sector's associational freedom and the diversity of viewpoints that it engenders. It also impedes the third sector's functioning by compelling nonprofit and philanthropic organizations to take the Government's side in an ongoing societal debate. For example, as a matter of best practices, many NGOs adopt a principle of impartiality in providing humanitarian relief and assistance. Specifically, the Code of Conduct for NGOs in Disaster Relief provides that "[a]id not be used to further a particular political or religious standpoint," and that such agencies "act independently from governments." *See* International Federation of Red Cross and Red Crescent Societies, *Code of Conduct for NGOs in Disaster Relief* arts. 3, 4; *see also* Larry Minear, THE HUMANITARIAN ENTERPRISE, DILEMMAS AND DISCOVERIES 76-80 (2002) (describing the importance of impartiality to international relief organizations and the way in which independence from state governments enables them to carry out their "humanitarian imperative"); Henry J. Steiner and Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 943-52 (2d ed. 2000). According to these principles, humanitarian assistance, in order to be effective, must not be linked to any political or religious viewpoint. *See id.* In part, this is so because of the danger attendant to operating in a conflict situation in which the organization is deemed to be an agent of any one side. *See* THE HUMANITARIAN ENTERPRISE 117-18, 161-65 (describing the dangers of humanitarian operations in unstable and war-torn countries as well as the dangers of being

perceived by the population to be served as affiliated with a participant in the conflict). Thus, in many instances, NGOs depend upon their independence from the Government and state actors in order to carry out their work effectively, by, for example, serving communities that might otherwise be wary of receiving assistance from Government or State actors. This purpose is undermined by the requirement of a pledge that inexorably links them to a particular side of an ongoing conflict or debate.

The values of independence, neutrality, and integrity are especially critical to the success of nonprofit and philanthropic organizations operating internationally. Recipients of Leadership Act funds, for example, operate in regimes that vary with respect to the legality of sex work. Thus, sex work is not criminalized in countries such as Senegal and Brazil. *See* Decl. of Chris Beyrer ¶¶ 20, 27, *AOSI*, No. 05-cv-8209 (S.D.N.Y. Sept. 28, 2005), ECF No. 3-4 (describing the success of Senegal in combating the spread of HIV/AIDS by decriminalizing sex work for sex workers registered with the Government, and noting that, due to the decriminalization of sex work in Brazil, outreach programs have been successful in reducing the rate of HIV). Likewise, in the Philippines, sex workers must register with the Government. *See id.* ¶ 26. In these and other countries in which sex work is not criminalized, United States based NGOs may and frequently do wish to provide public health assistance or to subcontract with others to provide such assistance, in order to stop the spread of

HIV/AIDS. In these countries and others, adopting the position of the United States Government will likely undermine the work of these organizations and hamper their ability to operate. *Accord* Carol Jenkins, UNAIDS, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India, and Bangladesh* 52 (2000) (identifying strong relationships with target group predicated on non-stigmatization as key to program success). In illustration of this point, the Brazilian government, which runs a highly successful HIV/AIDS prevention program, returned $40 million in grants from the United States on the ground that its ability to conduct effective outreach to sex workers would be undermined if their NGO partners were forced to state their explicit opposition to prostitution. *See* Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005 at A3.

Moreover, the Government itself recognizes that neutrality and independence are often prerequisites to the effective work of NGOs operating internationally. For even as it becomes increasingly clear that sponsoring international relief and development stands to further the national security of the United States, *see* 22 C.F.R. § 226 *et seq.* (implementing requirement that all USAID program materials be marked as "from the American people"), so too is it recognized, even by the Government, that in some instances, conferring Government identity on NGOs threatens their effectiveness. Thus, by their terms, the branding requirements of USAID do not apply if

they would "compromise the intrinsic independence or neutrality of a program," "diminish the credibility" of reports or recommendations, or "offend local cultural or social norms." 22 C.F.R. § 226.91(h)(1) (listing presumptive exceptions to branding requirement).

Finally, the pledge requirement threatens the vitality of nonprofit and philanthropic organizations by subverting the values of transparency and accountability upon which public trust and participation in the third sector is predicated. As the above examples illustrate, third sector organizations regularly distinguish themselves specifically as non-governmental identities, as a result of which the affected populations do not attribute their actions or viewpoints to the Government. Indeed, in other contexts, Petitioners themselves have recognized as much. For example, in 2004, Petitioner USAID promulgated a rule removing certain barriers to the participation of faith-based agencies in USAID programs. *See* 69 Fed. Reg. 61,716 (Oct. 20, 2004). In order to avoid any violation of the Establishment Clause of the United States Constitution, faith-based agencies are eligible for USAID funding so long as the funding at issue is not used by those agencies for "inherently religious activities." *Id.* at 67,717. The rule recognizes that "a religious organization that participates in USAID programs *will retain its independence* and may continue to carry out its mission, including the definition, practice, and *expression* of its religious beliefs, provided that it does not direct financial assistance from USAID to support any inherently

religious activities." *Id.* (emphases added). Thus, even the Government accepts that third sector organizations are not only independent, but hold themselves out to the public as independent, autonomous entities. And, even more, in this example the Government recognized that creating "firewalls" between government-funded services and religious activities of a grantee recipient, such as accounting procedures distinguishing publicly and privately funded activities, was "more than sufficient" to maintain recipient organizations' independence, while still ensuring that public funds were being put toward their intended uses. 69 Fed. Reg. at 61,721. Mandating that recipient organizations adopt a Government policy was therefore unnecessary, in addition to being unsound.

Principles of transparency dictate that third sector organizations ensure that all representations made in promotional, fundraising, and other documents reflect the underlying values and mission of the organization. *See* INDEPENDENT SECTOR, *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community* 20-21 (2002). The pledge requirement and USAID's corresponding guidance on the formation of affiliates forces third sector organizations into an untenable position: they must adopt a policy that does not reflect the views of their members as if it were their own, and thus either abandon certain activities that would otherwise be within their mission or create affiliate organizations that in fact obscure their structure and activities. That the Government anticipates and accepts such

duplicity, *see* Pet'rs Br. 48 (advocating that organizations seeking to maintain neutral or conflicting position may "form affiliates whose sole purpose is receiving and administering HIV/AIDS funding"), does not lessen the deleterious impact of such practices. In addition to incurring unnecessary and non-negligible administrative costs, creating disingenuous affiliate structures violates a key tenet of the third sector: "Accountability to the public is a fundamental responsibility of public benefit organizations; openness and honesty in reporting, fundraising and relationships with all constituencies are essential behaviors for organizations which seek and use public or private funds and which purport to serve public purposes." *Obedience to the Unenforceable* at 18.

Ultimately, in the face of the pledge requirement at issue in this case or like requirements, partnerships between the Government and public sector will be less effective as NGOs are forced to choose between adopting policies that may severely hamper their legitimacy and effectiveness or forgoing Government funds altogether. As the district court noted, NGOs such as plaintiffs in this case play a "critical role" in "stimulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups in [combating the HIV/AIDS pandemic]." *AOSI*, 430 F. Supp. 2d at 263. Third sector organizations will find it difficult if not impossible to experiment with new views and approaches to addressing the HIV and AIDS pandemic

if forced to adhere to the restrictions of the pledge requirement. As the district court warned,

> [T]he government's intervention would carry the substantial likelihood to redirect the choice of speech that a recipient might otherwise feel entirely uninhibited to make, and by the use of such inducements derived from its vast resources, to tilt the public power equilibrium to the choice of view the government elects to favor.

Id. at 258.

It is not only the third sector organizations that stand to lose in such a scenario. Without the vital independence of these organizations, and the diversity of views engendered by that independence, the Government is left to partner only with its ideological bedfellows, and is consequently deprived of the robust exchange of ideas that lead to innovative approaches to solving pressing social problems. *Cf. Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (observing that, in invalidating regulation of speech in university context, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection") (internal quotation marks omitted)). Our history bears witness to the substantial benefits that would be lost thereby; our future cannot afford such consequences.

CONCLUSION

The pledge requirement has the effect of undermining the critical partnership between Government and civil society, which has served as a cornerstone of our democracy. Without maintaining its autonomy, the ability of the third sector to work together with Government to provide essential services and to solve urgent public problems is severely compromised. Efforts to compel members of the third sector to adopt a single viewpoint favored by Government will distort the independent voices of the third sector, and will ultimately deprive our democracy of the fruits of the third sector's robust autonomy.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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